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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

- (1) NOT REPORTABLE
- (2) NOT OF INTEREST TO OTHER JUDGES
- (3) REVISED

Case No: 10417/2015

24/5/2017

In the matter between:

B J B

(Born W)

Plaintiff/

First defendant in reconvention

and

A E C B

Defendant /

First Plaintiff in reconvention

D M B N.O

Second Plaintiff in reconvention

(in his capacity as Trustee of
Kudu Street Trust)

M C B N.O

Third Plaintiff in reconvention

(in her capacity as Trustee of
Kudu Street Trust)

JEANCON CC

Second defendant in reconvention

JUDGMENT

MAKHUBELE AJ

Introduction

[1] This is an exception noted by the plaintiff in the main divorce action against the defendant's counterclaim on various grounds on the basis that the allegations therein are either bad in law, vague and embarrassing and or they do not disclose a cause of action. The parties in the divorce action will be referred to as they were cited in the main action.

- [2] The defendant has joined other parties in his counter-claim, namely,
- (a) A Close Corporation owned by the plaintiff as the second defendant in the counter-claim. It will be referred to as "Jeancon. CC".
 - (b) second and third plaintiffs, who, for the sake of convenience, will be referred to as "the Trustees of the Kudu Street Trust".

Legal principles on exceptions

[3] Rule 18(4) of the Uniform Rules of Court provides as follows: *"Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto."*

[4] Ambiguity on its own is not sufficient. There must be evidence that the opposing party will be seriously prejudiced if the relevant portions in the declaration are allowed to stand. The vagueness must relate to the cause of action. As stated in **Jowell v Bramwell - Jones and Others 1998(1) SA 836 (W) at 905**, the question is whether the exception goes to the heart of the claim, and if so, whether it is vague and embarrassing to the extent that the defendant does not know the claim he has to meet, and should he find that an exception on any ground fails, to then ascertain in the second place whether the particulars identified by the defendant are strictly necessary in order to plead and, if so, whether the material facts are unequivocally set out.

[5] Rule 18(6) of the Uniform Rules of Court provides as follows:

"A party who in his pleading relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded,

and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading".

[6] In the matter of **Trope and Others v South African Reserve Bank**¹, **Macreath J** considered the meaning of "vague and embarrassing" in the context of exceptions and the nature of the enquiry that the court should undertake.

"No doubt, the absence of the opportunity to clarify an ambiguity or cure an apparent inconsistency, by way of further particulars, may encourage greater particularity in the initial pleading.

The ultimate test, however, must in my view still be whether the pleading complies with the general rule enunciated in Rule 18(4) and the principles laid down in our existing case law.

An exception to a pleading on the ground that it is vague and embarrassing involves a two-fold consideration. The first is whether the pleading lacks particularity to the extent that it is vague. The second is whether the vagueness causes embarrassment of such a nature that the Excipient is prejudiced (Quinlan v MacGregor 1960 (4) SA 383 (DJ at 393E- H). As to whether there is prejudice, the ability of the Excipient to produce an exception-proof plea is not the only, nor indeed the most important, test - see the remarks of Conradie J in Levitan v Newhaven Holdings Enterprises CC 1991 (2) SA 297 (C) at 298G-H. If that were the only test, the object of pleadings to enable parties to come to trial prepared to meet each other's case and not be taken by surprise may well be defeated.

Thus it may be possible to plead to particulars of claim that can be read in any one of a number of ways by simply denying the allegations made; likewise to a pleading which leaves one guessing as to its actual meaning.

¹ (64 1/ 9 1) ZASCA 54; 1993 (3) SA 264 (AD); [1993] 2 ALL SA 278 (a) (31 March 1993)

Yet there can be no doubt that such a pleading is excipiable as being vague and embarrassing - see Parow Lands (Pty) Ltd v Schneider 1952 (1) SA 150 (SWA) at 152F-G and the authorities there cited.

It follows that averments in the pleading which are contradictory and which are not pleaded in the alternative are patently vague and embarrassing; one can but be left guessing as to the actual meaning (if any) conveyed by the pleading."

[7] The words "cause of action" were described as follows in **McKenzie v Farmers' Co-operative Meat Industries Ltd 1922 AD 16;**

"every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

[8] The cause of action must have been in existence at the time of issue of the summons. In **Philotex (Pty) Ltd and Others v Snyman and Others 1994 (1) SA 710 TPD** at 715 D-G Van Dijkhorst J stated amongst others the following the following in this regard:

"The general approach in this Division has for many decades been that a cause of action should exist at the time of institution of action..."

[9] The excipient , in order to succeed, has a duty to persuade the court that upon every interpretation that the pleading is based, no cause of action or defence whatsoever is disclosed.

Theunissen v Transvaalse Lewendehawe Koop Bpk 1988 (2) SA 493 (A)

[10] In terms of Rule 20(2), a declaration is required to set forth the nature of the claim and the conclusions of law which the plaintiff shall be entitled to deduce

from the facts stated. A declaration is excipiable if it lacks averments that are necessary to sustain an action. Th is requirement is equally applicable to particulars of claim.

[11] It is also important to note that for purposes of adjudicating on an exception, the court must look at the pleading excepted to as it stands.

See: **Minister of Safety and Security v Hamilton 2001 (3) SA 50 (SCA)**

[12] It is now trite that non -joinder can be raised by way of exception.

See: **Ramatshimbila v Phaswana (199 /13) [20141 ZASCA 117 (19 September 2014)**

The relevant paragraphs in the counterclaim

Claim B

[11] The defendant alleges that during 2001 he and the plaintiff entered into an oral agreement with certain express, alternatively tacit and further alternatively implied terms amongst which were that:

- (a) The y would identify an immovable property that they would purchase and utilize as their common home and that it would be registered in the name of the plaintiff who was going to hold it in trust as his nominee to safeguard it from financial risk. The financial risk that was anticipated was the financial success of the plaintiff's father's family business known as [...] (Pty) Ltd in which he had purchased shares during 1998/1999.
- (b) The defendant would pay all costs related to the purchase and transfer of this property, monthly bond instalments , maintenance.
- (c) The plaintiff would not alienate, encumber, burden or dispose of the immoveable property.
- (d) The property would then be transferred and registered in his own name upon demand at his on costs.

[12] The immovable property was indeed identified and purchased. it is situated at [...]. It was registered as agreed in the names of the plaintiff . The defendant paid all costs relating to the purchase and transfer as well as bond instalments in favour of Nedcor Bank with bond number [...].

[13] The plaintiff breached the terms of the oral agreement in that she encumbered the common home during or about 2006 without his knowledge and or consent by procuring a second bond over the property for an amount of Five Hundred Thousand Rand (R500 000.00) which bond facility was registered with First Rand bank with bond number [...].

[14] In its amended form, paragraph 4.4 of the counter-claim reads as follows:

" despite demand alternatively demand herewith , the first defendant refuses to transfer the common home to the first plaintiff"

[15] The relevant relief sought in Claim B is in prayers 4 -10 and read as follows;.

4. *An order declaring that the immoveable property situated at [...], Tzaneen, Limpopo Province is the property of First Plaintiff;*
5. *An order declaring that First Plaintiff is the owner of the immovable property situated at [...], Tzaneen, Limpopo Province and that First Defendant is holding the aforesaid immovable property in trust as nominee for First Plaintiff;*
6. *An order declaring that First Plaintiff is entitled to the transfer of the immovable property situated at [...], Tzaneen, Limpopo Province to the name of the First Plaintiff, at the costs of the First Plaintiff;*
7. *An order that, subject to the rights and interests of Nedcor Bank, the First Plaintiff is entitled to do the necessary to effect cancellation of the bond facility with bond number [...] held in the name of First Defendant over the aforementioned property in favor of Nedcor Bank and register this bond facility in the name of First Plaintiff, and pay all the costs in this regard;*
8. *An order that, subject to the rights and interests of Nedcor Bank, the First Defendant shall sign any and all documentation to effect cancellation of the bond facility with bond number [...] and registration of this bond facility in the name of the First Plaintiff, failing which the Sheriff of Tzaneen is hereby authorised to sign same on behalf of First Defendant.*
9. *An order that, subject to the rights and interests of First Rand Bank, the First Defendant shall, within 30 (thirty) days of this order, repay any and all outstanding amounts in respect of the bond facility with bond number [...] held*

in the name of the First Defendant registered over the aforementioned property in favour of First Rand Bank, cancel such bond facility and pay all costs in this regard:

10. *An order that First Defendant shall do the necessary and sign any and all documentation to effect transfer of the immovable property into the name of the First Plaintiff, failing which the Sheriff of Tzaneen is hereby authorized to sign same on behalf of First Defendant;"*

as the relevant prayers read, is subject to the rights and interests of the banks. The banks can set their requirements. The orders sought do not require the banks to do anything. The duty is placed on the defendant to take the necessary steps to comply with whatever requirements the banks may set for cancellation and transfer of the bonds into his names.

The question is whether the banks have a legal interest in the subject matter of the action that could be prejudicially affected by the orders sought. She referred me to the case of **United Watch & Diamond Co and Others v Disc Hotels and Others 1972 (4) SA 409 (C)**.

Nedbank will not lose its security over the property.

[20] One of the issues considered in **the matter of Judicial Service Commission v Cape Bar Council (Centre for Constitutional Rights as amicus curiae)**² non-joinder of one of the Judges appointed during one of the sittings of the JSC that was allegedly not duly constituted.

The principles of joinder of parties were re-stated as follows by Brand JA ;

"[12] It has by now become settled law that the joinder of a party is only required as a matter of necessity - as opposed to a matter of convenience - if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned (see eg Bowring NO v Vrededorp Properties CC 2007 (SJ SA 391 (SCA) para 21J. The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea. The right of a party to validly raise the objection that other

² neutral citation: 818/11) [2012] ZASCA 115 (14 September 2012)

parties should have been joined to the proceedings, has thus been held to be a limited one (see eg Burger v Rand Water Board 2007 (1) SA 30 (SCA) para 7: Andries Chari Cilliers, Cheryl Loots and Hendrik Christoffel Nel Herbstein & Van Winsen The Civil Practice of the High Courts of South Africa 5 ed vol 1 at 239 and the cases there cited .)"

Arising from the cases referred to in this judgment³, the overriding principle is that a party has a legal interest if the court order is directed at them. The prejudice that the plaintiff in this matter complains of is not real because , as Ms. Van Niekerk has argued, the relief sought has taken cognizance of the interests of the banks. If the defendant does not meet the requirements that the banks would have set for cancellation and transfer of the bonds, that will be the end of the matter. If he wants to challenge the decision of the banks, it will be in a separate application and on different grounds .

Consequently, there is no merit in the complaint under the second ground of

³ The following paragraphs bear reference:

[15] Having said all that, it must be accepted , in my view, that Judge Henney's appointment would, to some extent, be tainted by the first declarator. Any doubt that this would be so is removed by what happened in the *Brown* case. But the court a quo found that the casting of this potential shadow over Judge Henney' s appointment, in itself, is not enough to render him a necessary party. It found support for this finding in the judgment of this court in *Gordon v Department of Health, KwaZulu- Natal* 2008 (6) SA 522 (SCA). What happened in *Gordon* was that the appellant, Mr. Gordon, applied for a promotion post in the department that was the respondent in that case. Though the selection committee found him the most suitable candidate, the department appointed a Mr. M to the post. Aggrieved by his non-appointment , Mr. Gordon instituted a claim against the department in the Labour Court for so-called protective promotion. As explained in the judgment of this court (para 4) this essentially amounted to a claim for all the benefits of the promotion post without an actual appointment to that post. In consequence, the appointment of Mr. M to the post would remain intact. The Labour Court found against Mr. Gordon on the merits. On appeal to the Labour Appeal Court, that court *mero motu* raised the non-joinder of Mr. M as a reason why the matter should not be entertained. Eventually the point of non- joinder thus raised , was upheld by the LAC on the basis that, if Mr. Gordon's claim were to succeed, Mr. M would be confronted with the finding that, as an objective fact, he was not suitable for the post to which he was appointed.

[16] But in upholding Gordon's appeal against that decision of the LAC, this court said *inter alia* (para 10):

'The ... appointee [who was found to be unsuitable] has no legal interest in the matter if the order will be directed at the employer (the author of the unsuitable appointment) to compensate the 'suitable' but unsuccessful applicant. Of course the successful but 'unsuitable' appointee will always have an interest in the order to confirm his/her suitability for the job but this is not a direct and substantial interest necessary to found a basis for him or her to be joined in the proceedings. . . . The successful appointee can only have a legal interest in the proceedings where the decision to appoint him is sought to be set aside which can lead to his removal from the post. He becomes a necessary party to the proceedings because the order cannot be carried into effect without profoundly and substantially affecting his/her interests.'

exception .

Third ground of exception (failure to plead the date of demand of transfer of the property into the name of the defendant)

[21] The plaintiff raised an exception to paragraph 4.4 of the counterclaim on the basis that the allegation about a demand to transfer the property into the defendant's name is vague and embarrassing because there is no indication as to when the demand of the words "alternatively demand herewith " in the amended counterclaim does not cure the defect.

[22] Ms. Vermaak -Hay argued that the date on which the demand was made is relevant for purposes of prescription .

Ms. Van Niekerk on the other hand dismissed this contention on the basis that prescription does not run within a year after the divorce if they are indebted to one another.

Furthermore, the date of demand is within the knowledge of the plaintiff. She can plead YES OR NO, or that the claim has prescribed.

The defendant has amended the relevant paragraph to include the words "demand herewith".

[23] There is no merit with regard to the complaint about lack of date on which the defendant requested transfer of the property into his name These details can be requested by way of further particulars for purposes of trial or the rules of discovery.

Therefore the third ground of exception is dismissed .

CLAIM C

[24] The parties allegedly entered into yet another oral agreement in May 2006 in terms of which the defendant would establish a family trust with the name of Alan Bisset Family Trust. The Trustees would be the plaintiff, the defendant and a third person identified as Iwan Johannes Van Zyl. The beneficiaries of the trust were the plaintiff, the defendant and their children born of their marriage. The plaintiff would attend to registration of the trust and as a representative of the

trust, she was going to enter into a deed of sale of immovable property with the Trustees of the Kudu Street Trust to purchase the property described as [...] with Diagram Deed Number [....]. This property was the principal place of business of Bisset Engineering cc.

She was also supposed to attend to registration of the property into the names of the Family Trust. He would pay all related costs, including monthly bond instalments.

[25] The Deed of Trusteeship was signed on 05 May 2006 by all the Trustees incorporating the terms of the oral agreement.

[26] In paragraph 5.2.5, the defendant alleges that the plaintiff entered into a written deed of sale with the Trustees of the Kudu Street Trust to purchase the business premises of Bisset Engineering CC for Six Hundred Thousand Rand (R600 000.00).

[27] The defendant paid all expenses including a deposit and transfer duties of One Hundred and Fourteen Thousand Rand (R114 000.00) and the monthly bond repayments for the remaining Five Hundred Thousand Rand to the Trustees of the Kudu Street Trust. Plaintiff did not make any financial contribution.

[28] In paragraph 5.3 the defendant alleges that the plaintiff fraudulently, alternatively negligently made certain misrepresentations to him including;

- (a) that the Alan Bisset Family Trust was registered (5.3.1),
- (b) that she as a representative of the trust purchased the business premises on behalf of the trust from the Kudu Street Trustees.(5.3.2)
- (c) that the business premises were registered in the name of the trust as the registered owner.(5.3.3).

[29] In paragraph 5.4, the defendant alleges that when the plaintiff made these misrepresentations , she , at all relevant times, knew that none of the issues indicated above have been done.

[30] With regard to registration of the property in the name of the Trust, the

defendant alleged in paragraph 5.4.4 that at all relevant times the plaintiff knew that the afore mentioned representation was false because the business premises were in fact registered in the name of Jeanc on. CC on 9 October 2006 and not in the name of the trust as they had agreed.

[31] In paragraph 5.5.3 the defendant alleges that he was induced to pay the monthly installments to First Rand Bank in respect of the bond with number [...]by the misrepresentations that the plaintiff made and that if it was not for this fraudulent misrepresentation by the plaintiff he would not have paid the amounts.

[32] Accordingly he suffered damages and he is entitled to an order in terms of prayers 13 and 14 of the counterclaim that the plaintiff and/or Jeancon CC repay him the amount of One Hundred and Fourteen Thousand Rand (R114 000) together with interest on the said amount and that he is also entitled to each and every bond installment he paid to First Rand bank with interest.

Exceptions noted against Claim C

Fourth ground of exception

[33] The allegation that the plaintiff and the defendant agreed between themselves that she would represent the trust to enter into a deed of sale with the trustees of the Kudu Street Trust to purchase the immovable property is according to the plaintiff bad in law because the Bisset Family Trust has three trustees and a decision to purchase immovable property into the name of a trust cannot be taken by two trustees to the exclusion of the third trustee.

Fifth ground of exception

[34] It is alleged that the allegation in paragraph 5.2.5 of the counter claim that the plaintiff entered into a written deed of sale for business premises as a representative of the trust is bad in law because is it trite that an immovable property can only be purchased and registered into the name of the trust by all the trustees acting together, or written authority of the trustees given, acting jointly. No allegation is made that the written deed of sale was entered into by the plaintiff in her capacity as trustee of the said trust on the written authority of the other two trustees.

Sixth ground of exception:

[35] The allegation in paragraph 5.3 of the counterclaim is said to be bad in law because the immovable property could only be purchased by all three trustees acting together, or with the written authority of all the trustees given, acting together.

Seventh ground of exception

[36] This ground of exception is premised on a contention that the defendant should have pleaded the date on which he came to know that the property was not registered in the name of the trust but in the name of Jeancon. CC.

I have dealt with a similar argument in the exception under ground number three with regard to failure to allege the date of demand for transfer of the property.

For the same reasons, there is no merit in the exception under ground number seven.

Eighth ground of exception

[37] The Plaintiff alleges that no cause of action has been made out against JJeancon. CC for the damages claimed relating to the payment of the bond installment in favour of First Rand Bank. Furthermore, the claim is vague and embarrassing because the defendant did not quantify the amounts he paid to First Rand Bank.

[38] The plaintiff's contention in the fourth, fifth and sixth grounds of exception is that in the absence of contrary provisions in the trust deed, or a resolution by a majority of the trustees authorizing one or two trustees to act on its behalf, the trustees must act jointly if the trust estate is to be bound by their acts.

The decision of the plaintiff and the defendant to purchase the property in the name of the trust and for the plaintiff to enter into the deed of sale is invalid because the third trustee was not party thereof.

Ms. Vermaak-Hay referred me to several cases in this regard.

[39] The counter-argument on behalf of the defendant is that Claim C is based on amongst others, fraudulent, alternatively negligent misrepresentations made by the plaintiff and in order to succeed in this claim, the defendant must allege and prove that when she made the representations, she knew that they were false and wrongful, she made them negligently or fraudulently and that they caused patrimonial loss for the defendant. He must also prove the damages he suffered.

[40] The issue is not the validity of the agreement between the plaintiff and the defendant or whether the trust is bound by such agreements but rather the misrepresentations that the plaintiff made. All that the defendant need to prove is the representations made by the plaintiff, that they were false and that he suffered damages.

Therefore, Claim C is not vague and embarrassing.

[41] My understanding of the cause of action in Claim C is same as Ms. Van Niekerk's.

Although a written deed of Trusteeship was signed, the creation of the Trust was not completed because the plaintiff did not register it. The property was purchased, not in the name of the Trust, but Jeanco.CC. It is clear from a reading of the alleged misrepresentations that there is no trust and therefore the complaint that the trustees should act jointly is misplaced.

The main issue is that the cause of action is the misrepresentations. It is about the oral agreement between the plaintiff and the defendant and what became of it. The defendant alleges that due to the misrepresentations, he acted to his detriment by making certain payments relating to the purchase of the property and he should be compensated.

Accordingly, there is no merit in the complaints under grounds 4,5 and 6 of the exception.

[42] In ground of exception number 7, the plaintiff's complaint is that the defendant has failed to plead the date on which he became aware that the property was in fact registered in the name of Jeanco. CC and not the Family Trust.

There is no merit in this ground of exception for reasons that I have already

stated with regard to exception number three. These details can be obtained by way of request for further particulars for purposes of trial.

[43] With regard to the eighth ground of exception, Ms. Vermaak - Hay submitted that no cause of action was disclosed against Jeanco. CC with regard to the relief for repayment of the money that the plaintiff allegedly transferred to it. The defendant amended its counterclaim in this regard and introduced a paragraph to the effect that Jeancon. CC received undue benefits as a result of the plaintiff's fraudulent, alternatively negligent misrepresentations. The plaintiff, received these undue benefits in her personal capacity and the only member of Jeancon. CC.

Ms. Van Niekerk argued that the only allegations that need to be made and proven are that Jeanco. CC received a benefit to which he was entitled, that there was no valid reason for such receipt, that it was enriched and he was impoverished.

She also made reference to the requirements of pleadings in terms of Rule 18. I have already dealt with this in the preceding paragraphs.

The argument is that the plaintiff may request further particulars to deal with the issue of the exact amount that was allegedly transferred to Jeanco.CC.

[44] Jeanco. CC is a party to these proceedings. The allegations against it is that it received certain benefits from the plaintiff.

In my view, the basis of the claim against it is clearly defined.

The remaining details regarding when and the exact amount paid may be requested in terms of the rules of court.

There is therefore no merit in the exception under ground number eight.

Claim E

[45] In paragraph 7.1 the defendant alleges that he is the sole member of Bisset Engineering CC and that during the period from 1 March 2014 to February 2015 the plaintiff, without his consent and/or knowledge unlawfully transferred money from the CC's First National Bank account number 62114457744, for the sole and absolute benefit of the plaintiff and/or Jeanco. CC. The total amount

transferred is four hundred and fifty six thousand rand {R456 000). In his amended particulars of the counter claim, the defendant alleges that Bisset Engineering CC ceded any and all claims that it may have against the plaintiff to him in terms of a written deed of cession.

Exceptions noted against Claim E:

Ninth ground

[46] The plaintiff's complaint is that the defendant cannot, in his personal capacity claim for damages that were suffered by Bissett Engineering CC. that is not a party to these proceedings.

The plaintiff persists with the exception and alleges that the amendment does not cure the exception.

[47] Although the deed of cession was not attached, what it provides for was pleaded.

Accordingly, there is no merit in the exception under ground number nine.

Conclusion

[48] Therefore, I make the following order;

[48.1] The plaintiff's exception is dismissed with costs.

MAKHUBELE AJ

ACTING JUDGE OF THE HIGH COURT

03 April 2017

Date heard: 31 January 2017

APPEARANCES

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